September 17, 2001

Mr. Therold I. Farmer
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2001-4136

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152053.

The Vernon Independent School District (the "school district"), which you represent, received a request for all documents used in the selection of a school nurse. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.104, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that you indicate that document 4 was prepared after the instant request for information was received. The Public Information Act applies only to information in existence at the time the request for information was received. *See* Gov't Code §§ 552.002, .021, .227, .351; Open Records Decision No. 452 at 3 (1986). Therefore, document 4 is not responsive to the instant request and need not be released to the requestor.

Next, we address your argument that documents 2 and 3 are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[1] Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common

[1]Pursuant to section 552.305(a), you have declined to release to the requestor certain information you believe may be protected under common law privacy pending this decision from our office.

law privacy as incorporated by section 552.101 of the Public Information Act.[2] *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation.* In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Although you state that the portions of the submitted information relating to the applicants' responses to the interview questions should be considered "highly embarrassing," we do not believe that any of the submitted information consists of highly intimate or embarrassing facts for the purpose of common law privacy.

Next, you contend that document 1 is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). You do not indicate that this information relates to a competitive bidding process contemplated by section 552.104. Furthermore, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). You contend that if document 1 were released to the public, it would give an unfair advantage to those persons able to prepare in advance and rehearse or practice their responses to the various questions posed in future hirings. However, you do not specifically show how the school district would be harmed by the release of document 1 in any particular competitive situation. Finally, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). You indicate that a person was recently hired for the position in question. Consequently, we find that document 1 is not excepted from disclosure under section 552.104 of the Government Code.

You also contend that document 1 is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) excepts from public disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the

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[2] Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

information was obtained." Document 1 consists of interview questions used by the school district in selecting a school nurse. It does not appear to consist of "commercial or financial information" for the purpose of section 552.110(b). *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 264-65, 463 (1983) (defining "commercial" and "financial"); *cf. Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. denied); Open Records Decision No. 669 (2000). Consequently, the school district may not withhold Document 1 under section 552.110(b).

Finally, you contend that documents 1, 2, and 3 are excepted from public disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." You cite Open Records Decision No. 450 (1986) in support of your arguments. In Open Records Decision No. 450, this office found that the predecessor to section 552.111 authorized a school district to withhold an appraiser's notes from classroom evaluations of instructors because the information consisted of "advice, opinion and recommendation." However, in Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath,* 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions as they relate to the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. Here, document 1 consists of a list of interview questions, not advice, opinion, or recommendations of school district employees. Furthermore, documents 2 and 3 relate to a routine personnel matter, not a policy decision. Therefore, the school district may not withhold document 1, 2, or 3 under section 552.111.

In summary, none of the exceptions you have raised apply to the submitted information. Therefore, the school district must release documents 1, 2, and 3 in full.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order

to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 152053

Enc: Submitted documents

c: Ms. Lillian Myers
9776 CR 124
Vernon, Texas 76384
(w/o enclosures)